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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EDWIN ORTIZ, JR. et al., Defendants and Appellants.	B285058 (Los Angeles County Super. Ct. No. GA097507)

APPEALS from judgments of the Superior Court of Los Angeles County, Michael Villalobos, Judge. Affirmed and remanded with directions.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant Clinton Alford, Jr.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant Edwin Ortiz, Jr.

Xavier Becerra, Attorney General of California, Gerald A. Engler, Chief Deputy Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Stephanie A. Miyoshi, Deputy Attorneys General for Plaintiff and Respondent.

INTRODUCTION

Defendant Clinton Alford, Jr. (hereafter, Alford) stands convicted of human sex trafficking, forcible rape of a child over 14, assault (three counts), unlawful sexual intercourse with a minor, kidnapping, and human trafficking to commit another crime. Defendant Edwin Ortiz, Jr. (hereafter, Ortiz) stands convicted of human trafficking, assault (two counts), kidnapping, and human trafficking to commit another crime.

On appeal, they challenge several of the trial court's evidentiary rulings, contend that the trial court committed instructional error, and that they should be resentenced on the firearm enhancements. Alford separately contends that his attorney was ineffective and that the court's rulings created cumulative prejudice. Ortiz separately challenges the court's refusal to instruct on the defense of duress. Only their claims on the firearm enhancements have merit. The judgments are affirmed. The matter is remanded for the limited purpose of allowing the court to exercise its sentencing discretion on the firearm enhancements.

FACTUAL AND PROCEDURAL BACKGROUND

I. Facts

A. Generally as to S.T.

S.T. was 11 years old the first time she was exposed to prostitution. She grew up in foster homes and by the time she was 15 years old, began engaging in prostitution herself.

Approximately four months later, in March, 2015, she met Alford. At the time, she had been stranded by her pimp because he had been beaten up by Alford. S.T. knew Alford was a pimp, and he told her that he could give her lodging, food and

protection. They had sex the first day they met, and she believed she was Alford's girlfriend. Even though she was only 15, S.T. told Alford that she was 17 and that her birthday was in November of that year. They had sex regularly until the incident in November. Alford said it would not be long before she turned 18, "so it wasn't a big deal." She thought it was better to say she was 17 instead of 18 so that she would have an excuse for not having an I.D., or being able to rent motel rooms on her own.

The day after meeting Alford, he took her to San Bernardino where she engaged in prostitution. She worked as a prostitute every day and gave all her money to Alford. To ensure this, Alford would make her remove her clothes and inspect her body. She made approximately $400 on a slow night, and "a rack," or $1,000 on a busy night. Her services were advertised on an Internet service called "Backpage," and during "dates" Alford would listen to what occurred via his muted cell phone. He required that she spend no more than 15 minutes with a client, and would punish her if she spent too much time. She had approximately 30 customers a day.

S.T. was tattooed with a number "3" in relation to Alford because it represented a group he had created.[1] The group included Alford, Ortiz and a third individual named Glenn Jackson. Jackson's girlfriend was a prostitute named Keisha.

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[1] Officer Ruzanna Luledzhyan of the Los Angeles Police Department (LAPD) testified for the prosecution as a human trafficking expert. She opined that a pimp often will have a "girl" get a certain tattoo as a form of "branding" to show that the girl belongs to him, and that a "3" tattoo, such as the one S.T. had on her chest, was to remind her that if she left her pimp, the three individuals represented by the tattoo would come looking for her.

S.T. tried to run away from Alford twice. After the first time, she returned to him because she was told by other pimps and prostitutes that Ortiz, Jackson and Alford were "going to places [she] used to work with guns" demanding that people turn her in otherwise "no one could work." S.T. believed Ortiz worked for Alford.

In October,[2] S.T. was pulled over for a traffic stop while driving Alford's red Ford Mustang. Alford was seated in the passenger seat, and was arrested when the officer found a small amount of marijuana, a loaded .22 caliber handgun, and $2,000 in the glove compartment.[3] S.T. was not arrested, but gave the officer a false name because she did not want to return to foster care.

B. Facts involving S.T. (Counts 2–8, and 11)

On November 9, Alford was again arrested, this time with Ortiz. Jackson told S.T. of their arrest and that she and Keisha were to earn bail money. S.T. intended to do this on her own, and Alford told her how much he needed. She went to Pasadena to make money and then attempted to go to Fresno. On her way to Fresno, someone called and told her to return to Alford's house.[4] She returned in a Greyhound bus, and took a taxi cab to Alford's home. She could not afford the entire fare so Alford's sister picked her up with her boyfriend, "Brainiac." When the pair

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[2] All unspecified date references are to the year 2015.

[3] During the trial, the parties stipulated that Alford had previously been given a $10,000 cash advance from a personal injury case.

[4] S.T. never revealed who called her.

picked up S.T., Brainiac and Alford's sister got into an argument. Brainiac hit the front windshield, causing the sister to pull over. S.T. then "butted in," angering Brainiac, who jumped into the backseat and began choking her. Alford's sister intervened, and stopped the altercation. Brainiac did not touch S.T.'s face, hit her legs or arms, or burn her with a cigarette.

By this time, Alford was out of jail and Brainiac was delaying S.T.'s return to Alford's home. S.T. spoke to Alford and told him that "she was being held hostage." She eventually arrived at Alford's house, and Alford arrived a half-hour later. She believed Alford was angry with her because she had not followed his instructions.

On November 10, Alford, Ortiz, S.T., Keisha, and Jackson went to a motel in Pasadena. S.T. believed they were going to celebrate her birthday because they had purchased a bottle of Hennessey. At some point, someone ordered pizza. Once in the room, Alford questioned S.T. about the numbers, pictures, and text messages in her phone which revealed that she had been in Fresno. He slapped her face. When he discovered a photo that particularly angered him, he ordered her to remove her clothes in the bathroom. After discovering that she had paid someone in Fresno who he believed to be a pimp, he returned, removed his jewelry, and beat S.T. for about 20 minutes. He then called Ortiz into the bathroom and ordered him to punch S.T. while Alford held her arms. He told Ortiz where to hit her, and when it appeared that Ortiz was pretending to hit her, Alford ordered him to stop pretending. Ortiz then hit S.T. for approximately 10 minutes.

That night, S.T. feared for her life because she believed this incident was different from other times she had been punished.

Alford told her that she "didn't deserve" the number "3" and burned her with a cigarette near the tattoo on her chest. He bent her over the counter and inserted his penis into her anus, causing her to cry. She had previously told Alford that she had been raped anally when she was four or five and did not want to have anal sex with anyone. He stuck tissue into her vagina and penetrated her with his penis. Afterward, he told her to take a cold shower.

S.T. tried to escape during a lull in the beatings, but Jackson grabbed her neck and pushed her towards the bed. Alford and Ortiz returned, and Alford ordered her to return to the bathroom. He made her turn on the cold water in the shower and stand in it. He pulled her by the hair, causing some of it to fall out. Alford and Ortiz continued to beat her until she eventually lost consciousness. She was awakened when water was thrown on her the next morning.

That day, Alford told her to get dressed because she was still going to make money for him regardless of how she looked. S.T. was in pain, barely able to walk, and one side of her face was "hanging." Alford told Ortiz to hide in the closet while S.T. was working to ensure her silence.

A man responded to an ad on Craigslist and was directed to the motel. A woman with a crown tattoo met him downstairs, walked him to a room, and accepted $100. When he entered, he noticed that S.T. was limping, had a black eye, and bruises on her knees, face and arms. S.T. indicated through hand gestures that there was someone in the closet with a gun and to call 911. The two then crouched on the ground and made "a couple of faking sex kind of sounds." The man left and called 911.

Meanwhile, Alford entered the room and demanded payment. When S.T. told Alford that someone had taken the money, he called her names, told her the beating was not over, and ordered her back into the bathroom. S.T. was terrified.

Los Angeles County Sheriff's Deputy Jeremiah Song responded to the motel. Ortiz looked out the window and told everyone that police were in the parking lot. Alford and Jackson jumped out the back window while S.T. ran downstairs and sprinted towards Deputy Song. S.T. told Song that she had been beaten and raped. Song noticed that she had a bruise on her right eye and what appeared to be a burn mark near a tattoo.

Los Angeles Sheriff's Detective Yoon Nam, the investigating officer, discovered a cup and ring on the ground inside the motel room. Nam reviewed footage from cameras at a nearby business that depicted Jackson, Ortiz, and Alford jumping out of the motel window. He also interviewed S.T., who had bruises on her face. When he asked S.T. to sit on a couch, she said she was in pain from being sodomized and had to lean to the side at nearly a 45-degree angle.

C. Forensic Evidence

Song transported S.T. to a medical center where she was examined by a forensic nurse from the Sexual Assault Response Team. Nurse Megan Forcum testified that there were burn marks on S.T.'s chest, and an abrasion and redness on her neck. She observed "severe facial trauma," swelling and bruising around S.T.'s eyes and face, defensive wounds on her left hand, and bruises and abrasions to her left thigh consistent with a fist or a foot. The color of the bruises indicated the injury occurred recently. S.T. also reported symptoms consistent with

strangulation, such as nausea, vomiting, light-headedness, headache, difficulty swallowing, and voice changes.

Forcum performed a sexual assault examination. During the exam, Forcum noticed and removed a wad of toilet paper that was lodged inside the vaginal canal, and saw a bruise to S.T.'s hymen. She swabbed S.T.'s vaginal and anal areas. A D.N.A. analysis of the swabs included Alford as a possible contributor to sperm and epithelial fractions.

There were five pieces of partially eaten pizza recovered from the room, and S.T. was a major contributor of D.N.A. on four of slices.

D. Facts Involving S.M. (Counts 12–14)

S.M. was a young adult. She came to Southern California from Arizona at the urging of friends, who showed her how to support herself as a prostitute. She was working as a prostitute in Los Angeles, San Bernardino and Orange counties. She did not have a pimp.

In September, she was working with two friends on Sepulveda Boulevard in Van Nuys. Ortiz pulled up in Alford's red Ford Mustang and pretended to be a potential customer. He asked her for a "date," and she got into the car with him. After discussing services, S.M. told Ortiz to make a U-turn. Instead, Ortiz entered a Big Lots store parking lot and parked. When S.M. opened the passenger door to get out of the car, she was met by Alford who attacked her and began to beat her with his fists. When she tried to fight back, Ortiz grabbed her from behind and forced her into the back seat of the vehicle. Alford held a small black gun to her head, and later handed it to Ortiz in the back seat. Ortiz held the gun to the side of her body while Alford yelled at her to shut up.

Alford asked S.M. if she had a pimp, and if so, told her he would have to buy her back. Alford looked through her cell phone and saw that she had a daughter. When she told him that she did not have a pimp, he told her that she would have to work for him in order to go back home to her daughter. He threatened to kill her, and S.M. was terrified. Alford took her I.D. and never gave it back. S.M. did not know Ortiz or Alford prior to this incident.

Alford and Ortiz stopped and picked up S.T. They introduced her to S.M. as "wifey," which is a slang term for a partner in prostitution. Over the next two to three days, the two women walked the "tracks" or "blades," where men go to find prostitutes. Alford told S.M. what to charge, and that he would be watching her. Ortiz never made eye contact with her or spoke to her. He and Alford had a friendly relationship and Ortiz followed Alford's instructions. S.M. never saw Alford threaten, beat, or point a gun at Ortiz.

A few days later, the women were on a "track" on Figueroa Street in Los Angeles when they were taken into custody on charges of loitering for prostitution. S.M. was separated from S.T. and told police that she had been kidnapped and forced to work as a prostitute.

II. Procedural Background

A. Charges

In the operative second amended information, the People charged both Alford and Ortiz with the following counts as to S.T.: count 2, human sex trafficking of a minor by force or fear

(Pen. Code, § 236.1, subd. (c)(2)),[5] and count 4, assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). Alford was separately charged with the following crimes as to S.T.: count 3, unlawful sexual intercourse with a minor (§ 261.5, subd. (c)); count 5, assault with a deadly weapon, to wit, cigarette butt (§ 245, subd. (a)(1)); count 6, forcible rape of a child over 14 years (§ 261, subd. (a)(2)); count 7, sodomy by use of force with a minor 14 or older (§ 286, subd. (c)(2)(C)); count 8, criminal threats (§ 422, subd. (a)); and count 11, assault with a semiautomatic firearm (§ 245, subd. (b)).[6]

As to S.M., the People charged Alford and Ortiz with the following crimes: count 12, kidnapping (§ 207, subd. (a)); count 13, assault with a deadly weapon, to wit, handgun (§ 245, subd. (a)(1)), a firearms enhancement ((§ 12022.5, subd. (a)); and count 14, human trafficking to commit another crime (§ 236.1, subd. (b)).

B. Trial and Verdict

The matter proceeded to jury trial. The jury acquitted Alford of sodomy (count 7) and assault with a semiautomatic firearm (count 11), and was unable to reach a verdict on the criminal threats charge (count 8). Otherwise, both defendants were convicted of all charges, and the jury found the gun enhancement alleged in count 13 to be true as to both defendants.

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[5] All further statutory references are to the Penal Code unless otherwise indicated.

[6] The People did not go forward on count 1, and the information did not include a count 9. Count 10 was alleged only as to defendant Glenn Jackson.

C. Sentencing

The trial court sentenced Alford to a total prison sentence of 33 years plus a consecutive indeterminate term of 15 years to life on count 2, human trafficking of a minor. Ortiz was sentenced to 20 years in the state prison. As to both defendants, the court consecutively imposed 16 months in the state prison (one-third of the midterm) on the firearm enhancement alleged pursuant to section 12022.5, subdivision (a) as to count 13, assault with a deadly weapon.

DISCUSSION

I. Evidentiary Rulings

A. Alford's Civil Settlement

1. *Pertinent Facts*

Alford was the beneficiary of an undisclosed settlement with LAPD for unrelated abuse that occurred prior to these offenses. During Evidence Code section 402 hearings held outside the presence of the jury, the prosecutor moved to exclude any evidence or questioning regarding the settlement. Trial counsel for both defendants contended that S.T. had a motive to fabricate or exaggerate charges against defendants because she knew Alford had received $10,000 as a partial payment of the settlement. They admitted that they did not have any evidence to this effect, but believed motive would be borne out by cross-examination.

The trial court gave both defense counsel an opportunity to cross-examine S.T. outside the presence of the jury. S.T. testified that Alford told her he had a pending suit against LAPD, but that she did not know the amount of the settlement. She assumed "it

was a lot" because it was against the police department, and Alford had shown her the footage on the Internet. She testified that she saw Alford return once with "a bunch of money" in an envelope. Later that day, he bought a red Ford Mustang. S.T. estimated Alford had received $10,000, but did not believe that was a lot of money.

Counsel for Ortiz speculated that "defendant[s] with a large amount of money can be potentially targeted for allegations of physical abuse or what not to bear out in civil lawsuits." Alternatively, Alford's trial attorney suggested that Alford's settlement could have motivated her to lie because she was "sucking penises for 100 bucks," "on her knees literally for," and "laying on her back for a fraction of what she sees him [Alford] getting."

The trial court did not find sufficient evidence of a "logical nexus" between Alford's receipt of past or future funds and S.T.'s fabrication of evidence. The court also expressed concern that, "if we start talking about settlements, we also start talking about allegations that the LAPD or the police abused Mr. Alford. We're going to get into a whole other scenario that is really not relevant to this case."

Despite the trial court's ruling, the parties later stipulated that Alford was provided with a $10,000 cash advance from a personal injury case on September 30, 2015. Alford's attorney requested the stipulation to provide an innocent explanation for the $2,000 found in his possession during his arrest with S.T.[7]

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[7] Alford's trial attorney also represented him in the civil action, and stated that Alford had received an advance hardship loan of $10,000 directly from her.

During closing argument, both defense counsel argued that S.T. was motivated to lie because of Alford's settlement. Alford's trial counsel even suggested that S.T. "[was] not the victim. She's the suspect."

2. *Analysis*

The trial court did not abuse its discretion in limiting testimony and evidence of Alford's civil settlement. A trial court's rulings on relevance and admissibility under Evidence Code section 352 are reviewed for an abuse of discretion. (*People v. Jones* (2017) 3 Cal.5th 583, 609.) "The weighing process under [Evidence Code] section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

Evidence may be admissible if it is " 'relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' " (*People v. Boyette* (2002) 29 Cal.4th 381, 428 (*Boyette*).) However, evidence may bear on the credibility of a witness, but still be collateral to the case. (*People v. Contreras* (2013) 58 Cal.4th 123, 152.)

While evidence of financial bias could be relevant to impeach a witness's credibility, defendants were given the opportunity to produce said evidence, and failed. While it was undisputed that S.T. knew about Alford's settlement, there was no evidence that this motivated her to fabricate or exaggerate her testimony. Trial counsel's speculative argument that, "defendants with a large amount of money can be potentially targeted for allegations of physical abuse or what not," are widely applicable to any scenario involving economic disparity.

Evidence leading only to speculative inferences is irrelevant. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035, citing, *People v. De La Plane* (1979) 88 Cal.App.3d 223, 244.)

Even assuming the information was relevant, it was within the trial court's discretion to exclude it "if it determines the probative value of the evidence is substantially outweighed by its possible prejudicial effects." (*People v. Jones*, *supra*, 3 Cal.5th at p. 609.) Even where an accuser has hired a civil attorney and initiated a civil lawsuit, courts have held that trial courts do not necessarily abuse their discretion in limiting cross-examination on the issue of financial bias. (*People v. Lee* (2015) 242 Cal.App.4th 161, 180–181 [defendant accused of beating homeless man with tire iron].)

Here, Alford was involved in a civil dispute with LAPD over alleged abuse. The court aptly assessed that even if the excluded information were relevant, its probative value would be substantially outweighed by the possibility that "evidence of the settlement could lead to evidence of the beating." Cases involving illegal police abuse are highly charged, and widely publicized. Introduction of Alford's alleged abuse would not only risk polarizing the jury on a collateral issue, but also mislead the jury in considering the merits of his civil case. Moreover, there is no evidence that the 15-year-old foster youth hired a civil attorney, or initiated a civil lawsuit. The trial court did not abuse its discretion in limiting evidence of Alford's civil settlement.

Defendants disagree and contend that the trial court's Evidence Code section 352 ruling violates due process, their Sixth Amendment right to confront witnesses, and deprived them of their right to present a defense. We reject the arguments.

To prevail on a confrontation claim, defendants must demonstrate that "cross-examination would have produced 'a significantly different impression of [the witnesses'] credibility.' " (*People v. Frye* (1998) 18 Cal.4th 894, 946, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) If not, the confrontation clause and related constitutional guarantees do not limit the trial court's discretion in this regard. (*People v. Contreras*, *supra*, 58 Cal.4th at p. 152.) Furthermore, a trial court's ruling that complies with the rules of evidence, as is the case here, ordinarily does not violate a criminal defendant's constitutional rights. (*Boyette*, *supra*, 29 Cal.4th at pp. 427–428.) Before the jury, S.T. was impeached throughout trial by inconsistencies between her trial testimony and earlier statements at the preliminary hearing, her admission to having provided police with false names and dates of birth, false personation, and refusing to reveal the names of some of the people involved in the case. Precluding impeachment of the witness for financial bias while permitting it on numerous other grounds did not create a " 'significantly different impression' " of S.T.'s credibility. (*Frye*, at p. 946.)

Alford points to *Crane v. Kentucky* (1986) 476 U.S. 683, 690; for the proposition that this ruling precluded him from presenting a complete defense as it "excluded all 'competent, reliable evidence bearing on the credibility of a confession when such evidence [was] central to the defendant's claim of innocence.' " In *Crane*, the trial court precluded the defense from introducing any testimony bearing on the circumstances which led to the defendant's confession to murder. (*Id.* at pp. 685, 686.) The defendant was a 16-year-old youth who was allegedly detained in a windowless room for a protracted period of time,

surrounded by many officers, and repeatedly requested and denied permission to telephone his mother. (*Id*. at p. 684.) Furthermore, there was no physical evidence to link him to the crime. (*Id*. at p. 691.) The court held that because the circumstances surrounding the taking of the confession were relevant not only to the legal question of its voluntariness but also to the ultimate factual issue of the defendant's guilt or innocence, exclusion of the testimony violated due process including his fair opportunity to present a complete defense. (*Id*. at pp. 688–689.)

Here, defendants were not precluded from attempting to demonstrate that S.T. was not worthy of belief. They were precluded from proving it with time-consuming and potentially inflammatory evidence that was not obviously probative on the question. In addition, there was significant circumstantial evidence introduced at the trial which corroborated S.T.'s testimony. Moreover, " '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*Boyette*, *supra*, 29 Cal.4th at pp. 427–428.)

B. Admissibility of the Facebook Posts

1. *Pertinent Facts*

S.T. admitted that she had maintained a Facebook account for five years under the name of Yvonne T. Alford's trial counsel sought to impeach her with 11 separate posts which appeared on her account at various times within six months to two years after

the incident. She testified that although her account was password protected, there were people who had access to her Facebook account. She refused to reveal those people, but did not believe that either defendant had access. She also believed that the first post, court's exhibit No. 1 ["DA paid me to give you up. I know it's all lies but I still love you"], appeared to have been a screenshot from a duplicate account made by someone else. She adamantly denied making the post.

Other than court's exhibit No. 1, the remaining posts pertained to S.T.'s reason for returning to Los Angeles (exhibits H, I, and O), how she felt about another woman presumed to be the mother of Alford's children (exhibits G, J), whether S.T. engaged in subsequent prostitution or now maintained a "ring of prostitutes" (exhibits M, P), whether she now drank Hennessy alcohol (exhibit N), or whether she protected herself with a gun (exhibit L). Of the eleven posts, the court admitted Court's exhibit No. 2,[8] excluded court's exhibit No. 1 on Evidence Code section 352 grounds, and excluded the remaining posts as irrelevant on Evidence Code section 350 grounds.

2. *Analysis*

As to court's exhibit No. 1, the court ruled "[that it would] not allow any questioning regarding payments made to the witness" unless counsel could establish that she had been independently paid for costs not related to travel. It is for the

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[8] The court admitted court's exhibit No. 2 which was later marked as defense exhibit F, ["LA bound [M]onday . . . . Lets see who sleepin on me now . . . get it on my own, own Id, own team. . . ."]. S.T. admitted having made this post, and the People did not object to its introduction into evidence.

trial court, in its discretion, to determine whether the probative value of relevant evidence is outweighed by a substantial danger of undue prejudice. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 596.) Evidence is substantially more prejudicial than probative if, broadly stated, it poses an intolerable " 'risk to the fairness of the proceedings or the reliability of the outcome.' " (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

S.T. was cross-examined outside the presence of the jury. She denied making the post, and testified that she had not been paid by the District Attorney. She itemized the travel expenses she had incurred, and how they had been reimbursed. Allowing the jury to infer that S.T. had been bribed for her testimony absent evidence to support it would undermine the reliability of the outcome of the trial. Even assuming S.T. made the post in court's exhibit No. 1, the court did not err in excluding it based on the potential for substantial prejudice.

Furthermore, the trial court did not abuse its discretion in excluding the remaining posts on relevance grounds pursuant to Evidence Code section 350. Defendants contend that exclusion of the posts deprived them of the strongest evidence that S.T. had fabricated the charges against them, except the charge of unlawful sex with a minor. However, even assuming the posts were made by S.T., the posts occurred after the events at issue, and none were material to the charges alleged in the information. Evidence can bear on the credibility of a witness, but still be collateral to the case. (*People v. Contreras*, *supra*, 58 Cal.4th at p. 152.) Moreover, evidence leading only to speculative inferences is irrelevant. (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1035.) The court did not err in excluding the posts on relevance grounds.

The People further argue that because Ortiz did not make an argument as to how the court's ruling was erroneous or prejudicial as to him, it should be considered waived. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363–364.) However, because arguments relating to S.T.'s credibility affect both defendants, we decline to construe a waiver of the issue.

Defendants also contend that Evidence Code section 1161, regulating the admissibility of evidence relating to a victim of human trafficking, could not have barred admission of the posts, and that there was sufficient evidence of authentication. Because the court's ruling was based solely upon relevance and undue prejudice grounds, we do not find it necessary to resolve legal issues pertaining to authentication or Evidence Code section 1161, as they were not the basis of the trial court's ruling.

Finally, defendants again urge us to find federal constitutional error. (*Chapman v. California* (1967) 386 U.S. 18, 23–24.) We decline. As we have said, there was no error federally, constitutionally, or otherwise.

C. Court Order for Facebook Records

Prior to trial, Alford's trial counsel requested that the trial court order the prosecutor to execute a search warrant upon Facebook seeking production of the posts from S.T.'s Facebook account. Alford's counsel argued that only law enforcement authorities could compel production from Facebook, and she needed that information to authenticate the posts. The trial court declined to issue the order stating that it "can't force the police agencies to conduct some type of search related to that request." As previously discussed, we need not address the propriety of the trial court's order because the court admitted the post in court's exhibit No. 2, and excluded the remaining posts as

irrelevant or unduly prejudicial on Evidence Code section 350 and 352 grounds.[9]

D. Exclusion of Alford's 911 call

1. *Pertinent Facts*

At trial, Alford's trial counsel sought to "refresh [S.T.'s] recollection" with a recording of a 911 call made by Alford. A transcript of the call reflects that Alford told the 911 operator that he received three calls from his mother, sister, and girlfriend. He said he could hear people inside the house, said they were going through the whole house, and that the person who called him was his sister, Quashaya Johnson.

S.T. had called Alford to tell him that she was "being held hostage" by Brainiac. Although the prosecutor had no objection to playing the 911 call made by Alford, the court called all counsel to sidebar and inquired as to the relevance of the recording. Alford's trial counsel contended that Alford's statements were relevant to impeach S.T. because her testimony, that Brainiac was holding her hostage, was allegedly different from what Alford told the 911 operator. Alford's trial counsel next contended that the tape was made contemporaneously. When again pressed by the court as to the relevance of the proffered recording, Alford's trial counsel claimed it clarified Alford's state of mind as it refuted the purported motive behind his beating of S.T. Alford's trial counsel insisted that S.T.

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[9] The propriety of a trial court order requiring the prosecution to seek a search warrant for discovery of electronic information is currently pending before the California Supreme Court in *Facebook, Inc. v. Superior Court* (2015) 15 Cal.App.5th 729, review granted January 17, 2018.

claimed that she had been beaten and raped because "she didn't do x," when in fact, Alford was angry at her for being misinformed about his family. The court asked, "[b]ut who cares why he was angry?" The court also pointed out that the witness, S.T., did not hear the conversation. After reading the transcript, the trial court refused to allow the recording to be played because it was not relevant.

2. *Analysis*

Alford contends that this ruling resulted in prejudicial error as this evidence would have established that S.T. misled Alford, contradicted her testimony that only Brainiac held her hostage, and shown that Alford had reason to be angry with S.T. This argument has no merit.

First, it is unclear how words uttered by Alford to a third party could be sought to impeach anyone other than Alford. In addition, Alford's understanding of the event could be attributed to someone other than S.T. since the transcript reflects that Alford received at least one other call from his sister who was inside the home, not in Brainiac's car. Finally, to be relevant evidence must have " 'any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' " (*Boyette*, *supra*, 29 Cal.4th at p. 428.) The jury was instructed "[n]ot having a motive may be a factor tending to show [] the defendant is not guilty." (CALCRIM No. 370.) (*People v. Thompson* (2016) 1 Cal.5th 1043, 1123 [" '[m]otive describes the reason a person chooses to commit a crime[ ]' "].) Here, Alford did not seek to introduce the 911 call to show the absence of motive, he sought to show a motive that was more sympathetic. The court did not abuse its discretion by excluding the call. Furthermore, the proper application of the ordinary rules of

evidence do not impermissibly infringe upon a defendant's due process rights. (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 119.)

E. Recalling S.T.

1. *Pertinent Facts*

During cross-examination of S.T., she was cross-examined by both defense counsel regarding whether she had eaten any pizza in the motel room. She testified that she had not, or that she did not remember eating any. The People also presented evidence that S.T. was a major contributor to D.N.A. found on four pieces of pizza. After the People rested, Alford's trial counsel asked to recall and confront her with the evidence on the pizza. The trial court denied the request stating that she had already been impeached by the D.N.A. evidence, and nothing would be gained by confronting her. During closing argument, Alford's trial counsel used this evidence to argue that S.T. had fabricated the charges.

2. *Analysis*

Alford contends that confronting S.T. with the D.N.A. results would likely have caused her to concede that she had eaten a substantial amount of the pizza, and this in turn would cause her to further concede that she had not been beaten in a bathroom throughout the entire course of the night. Evidence Code section 774 provides that "[a] witness once examined cannot be reexamined as to the same matter without leave of the court," which "may be granted or withheld in the court's discretion." Furthermore, this decision will not be disturbed unless an abuse of discretion is shown. (*People v. Tafoya* (2007) 42 Cal.4th 147, 177; Evid. Code, § 774.) Both defendants cross-examined S.T.

about the pizza. It is hard to imagine that confronting her with D.N.A. evidence concerning her pizza consumption would cause her to recant all of her prior testimony. The court did not abuse its discretion in denying the motion to recall her.

F. Reopening the Defense Case

1. *Pertinent Facts*

In a final afternoon session of trial, both defense counsel stated that they would not be calling any witnesses, and rested their cases. All parties agreed that the jury would be excused to the jury assembly room for 30 minutes, and would return to hear instructions that same afternoon. The court encouraged the jurors, "you're almost there." Arguments were to begin the next morning at 9:00 a.m. On the record, but outside the presence of the jury, the parties began selecting instructions. Trial counsel for Alford asked the court to include variable language within CALCRIM No. 1071 because she believed the evidence supported Alford's belief that S.T. was over 18.

The court denied the requested language, "so we discussed yesterday, and it's my belief that there isn't sufficient evidence of a good faith belief that the victim, this would be S.T., that she was 18 years or (*sic*) age or over. The only evidence I heard was when S.T. testified she told defendant Alford when she met him that she was 17 years old instead of her actual age which was 15. And so based on her testimony, she told him that she was still under 18, a minor. And so I don't believe there is a sufficient factual basis for that good faith belief based on the evidence that I heard." Alford's trial counsel pointed out that S.T. carried two I.D.s indicating that she was older, and that she told a police officer in Alford's presence that she was over 18. Alford's trial counsel told the court, "if that's the inclination, then I'd be

inclined [to] request that we open—re-open and limit it just to the question of one of the sisters as to what they heard Ms. S.T. say her age was to them in the presence of Mr. Alford, because the age carries the life term." The court corrected Alford's trial counsel explaining that the language she sought did not pertain to human trafficking ("the life term"), only to unlawful sexual intercourse. The court again denied the request for the modified instruction. The parties continued to discuss the remaining instructions. Neither defendant contends that the instruction was given in error.

2. *Analysis*

Alford contends that in denying the defense motion to re-open, the court abused its discretion, deprived him of his constitutional right to meaningfully present a complete defense, and was fundamentally unfair. The People argue that by failing to press for a ruling on the request to re-open, Alford forfeited his contention that the trial court erred or violated his constitutional rights. We agree with the People.

If the trial court's failure to hear or rule on a motion appears to be inadvertent, the defendant must make some appropriate effort to obtain the hearing or ruling. (*People v. Braxton* (2004) 34 Cal.4th 798, 813.) This is also true of evidentiary rulings. (*People v. Hayes* (1990) 52 Cal.3d 577, 618– 619 [objection to admission of evidence forfeited on appeal by failure to press for a ruling].) Failure to press for a ruling deprives the trial court of the opportunity to correct potential error. (*People v. Morris* (1991) 53 Cal.3d 152, 195, overruled on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830.)

Here, not only did Alford's trial counsel not press for a ruling, her "inclination" to make the motion seemingly dissipated

once the court corrected her understanding regarding the applicability of the instruction she sought. Thus, the motion was therefore not sufficiently specific to preserve the alleged error. (Evid. Code, § 353; *People v. Coleman* (1988) 46 Cal.3d 749, 777; *People v. Ghent* (1987) 43 Cal.3d 739, 766.)

We also reject the claim on the merits. Whether to grant a motion to re-open is left to the sound discretion of the trial court. (See *People v. Masters* (2016) 62 Cal.4th 1019, 1069.) In determining whether the trial court abused its discretion, we consider four factors: (1) the stage of the proceedings when the motion was made; (2) the defendant's diligence or lack of diligence in presenting the new evidence; (3) the prospect that the jury would give the new evidence undue emphasis; and (4) the significance of the evidence. (*Ibid*.)

Here, Alford's counsel asked to re-open in the final hours of trial after all sides had rested and the jury was advised that they would be hearing instructions and closing argument. Alford's counsel went so far as to state before the jury that she would not be calling any witnesses and "at this time we'll rest as well with the evidence as is." Second, as discussed previously, Alford's counsel was not diligent in presenting the evidence, nor was the evidence new. Alford points to *Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 319 and *In re Marriage of Olson* (1980) 27 Cal.3d 414, 422 to support his contention that the trial court maintains discretion to permit reopening of a case in order to avoid injustice when there has been a substantial change in the party's circumstances. However, neither case cited pertained to a jury trial, and both cases involved a substantial change to the litigant's circumstances before a final decision was rendered by the court. In *Stoumen*, the proffered evidence came into existence

after the submission of the case for decision but before any findings had been signed by the superior court. (*Stoumen*, at p. 319.) In *Olson*, a substantial change in the property at issue occurred after trial, but before entry of an interlocutory decree. (*Olson*, at p. 422.) Here, the sisters' proffered testimony was available prior to all sides resting, and there was no reason it could not have been introduced earlier.

Third, because the jury had been advised that they would hear instructions and argument, it is likely that they would give the evidence undue emphasis if the court suddenly allowed for additional testimony instead of providing instructions and closing arguments as promised. Finally, the evidence sought, testimony that S.T. stated in Alford's presence that she was over 18, was duplicative. As identified by Alford's trial counsel, there was testimony during the trial that S.T. had made the same claim to a police officer in Alford's presence. Even on the merits, the court did not abuse its discretion in denying the request to re-open the defense case.

II. Ineffective Assistance of Counsel

Alford contends in the alternative that if the court did not abuse its discretion in denying the request to re-open, then his trial counsel rendered ineffective assistance because of her unreasonable failure to present testimony from Alford's sisters. To prevail on a claim of ineffective assistance of counsel, Alford must demonstrate that (1) his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686–687; *People v. Williams* (1997) 16 Cal.4th 153,

215.) The burden of proving a claim of ineffective assistance of counsel is squarely upon the defendant. (*People v. Cornejo* (2016) 3 Cal.App.5th 36, 57.)

The People urge us to find that trial counsel's failure to call the sisters was a tactical decision made to avoid potential weaknesses in the sisters' testimony. We think it is likely that Alford's trial counsel made a tactical decision not to press the court for a ruling once she realized that the language she sought did not apply to the "life term," on the human trafficking charge. It is equally likely that she mistakenly believed the state of the evidence was sufficient to support the variable language in CALCRIM No. 1071. Regardless of whether it was a mistake or tactical decision, Alford's claim must be rejected because he fails to establish prejudice. To establish that element, there must exist a reasonable probability that but for the attorney's decision, the result of the trial would have been different. (*People v. Patterson* (2017) 2 Cal.5th 885, 900.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*People v. Orloff* (2016) 2 Cal.App.5th 947, 954–955.) Furthermore, prejudice must not be speculative, but must be established as a demonstrable reality. (*Id*. at p. 956.)

Alford has not carried his burden. The proffered testimony would not have changed the outcome of the trial because it was duplicative of other testimony, and did not undermine the persuasive value of the overwhelming evidence to the contrary. The jury heard testimony from S.T. that she told Alford on the first day she had sex with him, that she was 17 years old. They also heard testimony that S.T. could not rent motel rooms on her own, and did not have an I.D. S.T. also told the police in Alford's presence that she was over 18. Hearing the same claim from two

more witnesses, with family bias in favor of Alford, is not substantial evidence of Alford's reasonable and actual belief that S.T. was 18 or older on the first day he had unlawful sexual intercourse with her in March. Thus, prejudice has not been established as a demonstrable reality and Alford's claim of ineffective assistance of counsel is rejected.

III. Cumulative Prejudice

Alford contends the cumulative effect of the alleged errors requires reversal. We reject this contention because there was no error to cumulate. (*People v. Avila* (2009) 46 Cal.4th 680, 718; *People v. Bolin* (1998) 18 Cal.4th 297, 335.)

IV. Instructional Error

A. The Duress Instruction

Ortiz contends that the court erred in denying his request for an instruction on the affirmative defense of duress. He argues that substantial evidence justified the instruction based upon S.T.'s testimony that he was not a willing participant to her beating on the night in question. Furthermore, S.T. testified in this regard that she "felt bad" about testifying against him, she failed to identify him to police, and believed that "he didn't want to do any harm." The court ruled that there was insufficient evidence to support the instruction since Ortiz was not in fear for his life when he engaged in the offenses.

Duress is available as a defense to defendants who commit crimes " 'under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.' " (*People v. Wilson* (2005) 36 Cal.4th 309, 331.) To show that the act was not the exercise of free will, a "defendant must show that he acted under an immediate threat

or menace." (*People v. Petznick* (2003) 114 Cal.App.4th 663, 676.) Further, " '[b]ecause of the immediacy requirement, a person committing a crime under duress has only the choice of imminent death or executing the requested crime.' " (*Ibid.*)

Ortiz relies upon *People v. Steele* (1988) 206 Cal.App.3d 703, 706 for the proposition that the threat or menace may be "accompanied by a direct or implied demand that the defendant commit the criminal act charged." Ortiz argues that S.T.'s testimony was sufficient to convey an implied threat to Ortiz by Alford if he did not follow Alford's orders. This premise is gleaned from the proposition that S.T. knew what Alford was capable of, and that he would shoot someone who did not do as he dictated. However, this view of the evidence fails to contemplate that the instruction requires an immediate threat of death. At most, the evidence shows that Ortiz followed Alford's orders, and that Alford confronted him by telling him to "stop pretending." There is no evidence, express or implied, that Ortiz's life was in danger if he failed to aid and abet in the human trafficking of S.T. The court did not abuse its discretion in refusing to give the duress instruction.

B. Instruction on the Lesser Included Offense of Simple Assault

Alford and Ortiz next contend that their conviction for assault with a deadly weapon perpetrated against S.M. must be reversed for the court's failure to instruct on the lesser included offense of simple assault. While the court agreed that simple assault was a lesser included offense, it did not find a sufficient basis to instruct on the lesser charge. The court's ruling was based on S.M.'s "firm" testimony that she was assaulted with a real gun and that she identified that gun as People's exhibit

No. 23. Although the court noted that the defense raised an inference that two months later, in November, Ortiz was caught in a vehicle with replica guns, it did not believe that was a sufficient basis to say that S.M. was mistaken or "infer that she may have been mistaken as to the use of the firearm." In fact, she identified a .22-caliber gun found the next month, in October, as the real gun.

The trial court here did not err in refusing to instruct on simple assault. A trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence. (*People v. Booker* (2011) 51 Cal.4th 141, 181 (*Booker*).)

Simple assault is a necessarily lesser included offense of assault with a deadly weapon. (*In re Brandon T.* (2011) 191 Cal.App.4th 1491, 1498; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1088.) It is error for a trial court not to instruct on a lesser included offense when the evidence raises a question whether all the elements of the charged offense were present, and the question is substantial enough to merit consideration by the jury. (*Booker*, *supra*, 51 Cal.4th at p. 181.) When there is no evidence the offense committed was less than that charged, the trial court is not required to instruct on the lesser included offense. (*Ibid.*) Substantial evidence is evidence from which a reasonable jury could conclude that the lesser offense, but not the greater, was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) On appeal, a court reviews independently whether the trial court erred in failing to instruct on a lesser included offense. (*Booker*, at p. 181.)

Defendants contend that because Ortiz was caught in a car containing replica guns, there was substantial evidence from which the jury could infer that a replica gun was used to assault

S.M. Alternatively, Ortiz argues that there was ample evidence from which the jury could have concluded that even if the gun was fake, it could have been used to hit S.M. However, these theories are not supported by the evidence. At trial, Ortiz's counsel flatly denied that her client was being charged with using the gun, replica or otherwise, to "club" anyone.

The instruction for the lesser included offense of assault requires in its final element that a defendant have "the present ability to apply force to a person." (CALCRIM No. 915.) If the gun in question was a replica, and was not being used as a "club," then by using it as an imitation weapon, it "could not eject a missile" and the defendant "would not have had the means to cause harm to the person whom he threatened." (*People v. Vaiza* (1966) 244 Cal.App.2d 121, 124–125.) "If a person threatens to shoot another with a toy gun, or, let us say, with a chocolate candy pistol, there is no ability to commit a violent or any injury with it on the person of another." (*Ibid.*) Here, the defendants were "either guilty of assault with a deadly weapon . . . , or of nothing." (*Ibid.*) Because there was no substantial evidence to support an instruction on the lesser included offense, the court did not err in denying defendants' request for the instruction on simple assault.

Even if the court erred, it was necessarily harmless since the jury found that the defendants personally used a handgun during the assault with a deadly weapon within the meaning of the firearm enhancement alleged pursuant to section 12022.5, subdivision (a). In a noncapital case, the trial court's failure to instruct on necessarily included offenses is reviewed for prejudice under the *Watson* standard. (*People v. Hicks* (2017) 4 Cal.5th 203, 215, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Pursuant to that standard, it is not "reasonably probable" that the defendants would have obtained a more favorable result had the trial court given the instruction on the lesser included offense. (*Watson*, at p. 836.)

IV. The Firearm Enhancement

On September 20, 2017, both Alford and Ortiz were sentenced on the firearm enhancement alleged pursuant to count 13. For that finding, the trial court imposed a one-year, four-month sentence enhancement consecutive to all other time, pursuant to section 12022.5, subdivision (a). At that time, trial courts had no choice but to impose section 12022.5 enhancements; the enhancements could not be stricken. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) Senate Bill No. 620 removed that impediment by amending section 12022.5, effective January 1, 2018, so that trial courts would be vested with the authority to strike section 12022.5 enhancements. (*Woods*, at p. 1090; § 12022.5, subd. (c).) Courts have held Senate Bill No. 620 applies retroactively to cases not yet final as of January 1, 2018. (See, e.g. *People v. Watts* (2018) 22 Cal.App.5th 102, 119; *Woods* at p. 1090.) Over the Attorney General's objection, a remand is necessary for the trial court to exercise its discretion whether to strike Alford and Ortiz's firearm enhancements.

DISPOSITION

The judgments of conviction are affirmed. The matter is remanded for the limited purpose of allowing the court to exercise its sentencing discretion consistent with the views expressed in this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MURILLO, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.